

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE DION STEWART,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 274618

Wayne Circuit Court

LC No. 04-005535-01

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of armed robbery, MCL 750.529, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, third-degree fleeing and eluding, MCL 257.602a(3), and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, of which defendant received sentences of 7-15 years, 2-5 years and 2 years respectively. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from the robbery of Kamel Al-Salemani outside his hotel room at a Quality Inn in Dearborn. Complainant spoke with two women at a truck stop. He indicated that he would be returning to the hotel, and they asked to ride with him because they also had rooms at the hotel. On the way back to the hotel, one of the women requested they take a detour so they could buy cigarettes. During this detour she spoke on her cell phone. Back at the hotel, as complainant began to open the door to his room, two men approached him and pointed guns at his head. The men took approximately \$94 and complainant's cell phone; one man hit complainant with a gun. As complainant went to the hotel office to report the robbery, he passed a car in the parking lot. The car was running and its lights were on. Someone was in the driver's seat, and the front passenger door was open. After complainant got to the office, he looked back and saw the men who had robbed him enter the car. Complainant pointed out the car to an off-duty Dearborn police officer who working as a security guard at the hotel. The officer followed the car and called for uniformed assistance. After a chase, defendant and the others were arrested. Defendant was in the driver's seat. Three loaded handguns and complainant's cell phone were found in the backseat of the car.

Defendant first argues that the trial court erred when it refused to give the requested missing witness instruction in CJI2d 5.12 concerning the absence of Jennifer Landis, one of the women who accompanied complainant to the hotel. Defendant argues that the trial court

improperly found that the prosecution had exercised due diligence in attempting to locate Landis. We review a trial court's determination of the appropriateness of a missing witness instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

The prosecutor's previous duty to produce res gestae witnesses has been replaced with "an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003), quoting *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). However, once the prosecution endorses a witness pursuant to MCL 767.40a(3), the prosecution must use due diligence to produce that witness at trial. *Eccles*, *supra* at 388. Due diligence requires that a good faith effort be made, not that every possible effort be made. *Id.* at 391; *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). If the prosecutor fails to provide such reasonable assistance, or due diligence, the defense may be entitled to a missing witness instruction. See *Perez*, *supra* at 420; *Eccles*, *supra* at 388.

The officer in charge of this case testified that she did not serve Landis with a subpoena because she was not able to locate Landis. Landis used her mother's address as her place of residence, but Landis' mother told the officer that she stated that she had not seen Landis in months and did not know how to contact her. The officer contacted Landis' probation officer, who informed her that Landis was missing and could not be located. The officer checked the LEIN system before trial and found that Landis had not yet been located, and that a warrant had been issued for her arrest. Under the circumstances, we find that the trial court's decision that the prosecution exercised due diligence in its search for Landis was not an abuse of discretion.

Defendant next argues that the prosecution failed to present sufficient evidence that he aided and abetted armed robbery, or committed felony-firearm. We review a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can fairly be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We must resolve all conflicts in the evidence in favor of the prosecution. *Wolfe*, *supra*.

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while armed with a weapon as described in the statute. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004). Defendant was charged with armed robbery under an aiding and abetting theory. "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39.

"To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some

other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime.” [*Carines, supra* at 757-758, quoting *People v Turner*, 213 Mich App 558, 568-569, 540 NW2d 728 (1995).]

Here, the evidence presented at trial supported finding that defendant both knew of and supported the others’ decision to rob complainant. Complainant’s testimony indicates that the robbery was premeditated, with the complicity, perhaps unknowing, of the women who asked him for a ride, and who told the robbers about the money he carried and where he was staying. Defendant drove the getaway car, which complainant testified that he saw with its engine running and its door open immediately after the robbery. Testimony that defendant attempted to evade pursuit both by the off-duty police officer and the uniformed officer provided circumstantial evidence that defendant intended that the robbery succeed and acted in conformity with that intent. Because the jury could find from the evidence presented all the elements of the crime beyond a reasonable doubt, the prosecutor was not required to disprove any other theory, such as defendant’s claim that he was merely giving the actual robbers a ride and only later discovered that they had robbed complainant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We find that the prosecution presented sufficient evidence to support defendant’s conviction of armed robbery.

Furthermore, we find that the prosecution presented sufficient evidence to sustain defendant’s felony-firearm conviction. The elements of felony-firearm are: (1) the defendant carried or possessed a firearm, (2) when committing or attempting to commit a felony. MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession may be actual or constructive, and may be proved by circumstantial evidence. *Id.* at 437. A person can have constructive possession if the firearm is known to the person and is reasonably accessible to him. *Id.* Possession may be exclusive or joint. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Here, three guns were found in defendant’s car in the rear passenger compartment, an area readily accessible to defendant. Defendant testified that he knew the guns were in the car, even though he also stated that they did not belong to him. The question of possession was one of fact for the jury to resolve. *Id.* at 469; *Hardiman, supra* at 428.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski